

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

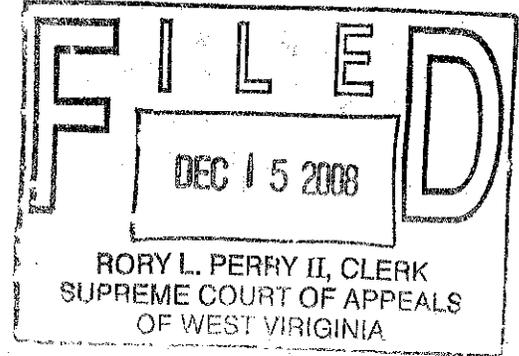
Freddie E. M. [REDACTED] Jr.,

Petitioner,

vs.

HONORABLE N. EDWARD EAGLOSKI, II
Judge of the Circuit Court of Putnam County,
West Virginia,

Respondent.



FROM THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA
Case Nos. 08-JA-14, 15, 16, 17

RESPONSE TO PETITION FOR A WRIT OF PROHIBITION

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JURISDICTIONAL STATEMENT

Counsel for the West Virginia Department of Health and Human Resources, by and through the State of West Virginia, Office of the Prosecuting Attorney, agrees with the Petitioner that the West Virginia Supreme Court of Appeals has original jurisdiction over writs of prohibition by virtue of *Article VIII, § 3 of the West Virginia Constitution*, as well as Rule 14 of the Rules of Appellate Procedure. Therefore, the DHHR avers that jurisdiction of this Court over the Petition for Writ of Prohibition at issue is proper as this matter falls under the original jurisdiction of the Court.

Furthermore, the West Virginia Department of Health and Human Resources (DHHR) recognizes that the matter before the Court is based on a Petition for Writ of Prohibition from the November 13, 2008, Order of the Circuit Court of Putnam County, Judge Eagloski presiding.¹

STATEMENT OF THE ISSUES

1. Whether the DHHR should have objected to the oral motion for a post-adjudicatory period of improvement made on behalf of a respondent mother, hereinafter referred to as Kari T., in an abuse and neglect proceeding, where Kari T. failed to file a written motion requesting the same, but where the DHHR agreed to not oppose Kari T.'s motion for a post-adjudicatory period of improvement by way of a stipulated adjudication agreement, and where no party objected to Kari

¹ The West Virginia Department of Health and Human Resources recognizes that at the time of the filing of the Petitioner's Petition for Writ of Prohibition, no written order from the November 13, 2008 hearing had been entered and filed with the Clerk of the Circuit Court of Putnam County. However, the written order from said hearing has since been entered and a copy of the same has been attached hereto as Exhibit 1.

T. being placed on a period of improvement during the hearing on the ground that she failed to file a written motion.

2. Whether the DHHR should have objected to Kari T.'s motion for a post-adjudicatory period of improvement where official results of a psychological evaluation performed on Kari T. were not yet made available to the multidisciplinary team prior to placing Kari T. on a post-adjudicatory period of improvement, but where the multidisciplinary team had convened and determined that as part of Kari T.'s case plan while on a period of improvement that she be required to undergo a psychological evaluation and comply with any and all treatment recommendations from said evaluation during her period of improvement.
3. Whether the DHHR should have objected to Kari T.'s motion for a post-adjudicatory period of improvement where Kari T. stipulated to adjudication and availed herself of services offered by the DHHR, and where the DHHR is required to make reasonable efforts to preserve and reunify the family absent a determination by the Circuit Court that the parent has subjected the child(ren) to aggravated circumstances or determined that another condition exists that would relieve the DHHR of its duty to provide reasonable efforts.

STANDARD FOR ISSUANCE OF A WRIT OF PROHIBITION

The DHHR agrees with the Petitioner that a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” *West Virginia Code* § 53-1-1.

The DHHR avers that the Circuit Court does have jurisdiction of the subject matter in controversy. Therefore, the granting of Petitioner’s Petition for Writ of Prohibition would have to be based on the Circuit Court, having jurisdiction of the subject matter in controversy, exceeded its legitimate powers.

The DHHR further agrees with the Petitioner that the standard for the consideration and issuance of a writ of prohibition by this Court is governed by the five factor examination as set forth in Petitioner’s brief and as outlined in Syllabus Points 1 and 2 of *State Ex. Rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, ___ W.Va. ___, ___ S.E.2d ___ (Slip Op. 33809). (Quoting Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996)).

STATEMENT OF FACTS

The Petitioner has provided the Court with a copy of the “Petition to Institute Child Abuse and Neglect Proceedings” filed by the DHHR in this matter, copies of the Orders following the preliminary and adjudicatory hearings, as well as the stipulated adjudication agreement entered into by Kari T. and her counsel, the Guardian Ad Litem and the Assistant Prosecuting Attorney on behalf of the DHHR. Therefore, the DHHR

does not feel it necessary to recite to the Court this information as it is laid out in Petitioner's Petition.

The DHHR will clarify for the Court that four respondents were initially named on the "Petition to Institute Child Abuse and Neglect Proceedings," as there are three different biological fathers to the four children that are the subjects of the abuse and neglect petition, in addition to the biological mother of all four children, Kari T. All four biological parents were named as respondents due to them being biological parents and either having allegations against them or being custodians of the children; however, allegations of abuse and/or neglect were only alleged against two of the respondent parents, namely Kari T. and Richard R.

The DHHR will further clarify for the Court that following the preliminary hearing on May 29, 2008, and in accordance with Rule 25 of the *Rules of Procedure for Child Abuse and Neglect Proceedings*, the Circuit Court set the matter for an adjudicatory hearing on June 24, 2008. (See "Adjudication Order," attached hereto as Exhibit 2.) During this hearing, the DHHR presented evidence of various witnesses. However, one key witness, Dr. Kahn, who was a treating physician of the child, B.T., while at CAMC Women and Children's Hospital, failed to appear after proper service of his subpoena had been made. The Circuit Court ordered the adjudicatory hearing continued to allow Dr. Kahn to appear and to allow the parties time to access Family Law Court records that were requested by the Guardian Ad Litem during the hearing after it was determined through testimony at said hearing that these records were necessary to proceed forward in adjudication as it pertained to the father, Richard R.

The adjudicatory hearing was continued on August 20, 2008. Prior to the DHHR continuing with any further testimony, Kari T. stipulated to adjudication as set forth in the "Rules 25 & 26 Stipulated Adjudicational Agreement" and attached to Petitioner's Petition for Writ of Prohibition as Exhibit 4. The "Rules 25 & 26 Stipulated Adjudicational Agreement" was entered into by Kari T. and her counsel, the Guardian Ad Litem, and the Assistant Prosecuting Attorney on behalf of the DHHR. As part of said agreement, Kari T. made various admissions regarding the abuse and/or neglect of the children named in the abuse and neglect petition, and the DHHR and the Guardian Ad Litem agreed not to oppose a motion by Kari T. for a post-adjudicatory period of improvement subject to the terms and conditions of the case plan to be developed by the multidisciplinary team. The Circuit Court accepted the "Rules 25 & 26 Stipulated Adjudicational Agreement" and found that there was clear and convincing evidence that Kari T. had neglected all four of her children as set forth in the "Adjudication Order" from the hearing held on August 20, 2008, and attached to Petitioner's Petition for Writ of Prohibition as Exhibit 5.

Following the adjudicatory hearing, the multidisciplinary team convened to develop a family case plan and to develop terms for a post-adjudicatory period of improvement should Kari T. be granted the same. The DHHR subsequently presented the Circuit Court and all parties with a copy of the Case Plan as developed by the multidisciplinary team. At a hearing on November 13, 2008, the Circuit Court adopted the Case Plan as submitted by the DHHR² and granted Kari T. a post-adjudicatory period of improvement. The Circuit Court found that there was no objection from the DHHR or the Court Appointed Special Advocate (CASA), while counsel for the

² See Exhibit 3 for the terms of Kari T.'s improvement period.

Petitioner did object to placing Kari T. on an improvement period because he did not feel that reunification of the children with Kari T. was in the best interests of the children.

Further, during the November 13th hearing, the Circuit Court also adopted the recommendation of the DHHR and CASA and ordered that Kari T. could have unsupervised visits with all four children *at the discretion of the DHHR and based on Kari T.'s progress with her case plan.*²

ARGUMENT

1. The DHHR did not object to Kari T.'s oral motion for a post-adjudicatory period of improvement even though Kari T. failed to file a written motion requesting the same because the DHHR had agreed not to oppose Kari T.'s motion for a post-adjudicatory when the parties entered into the stipulated adjudication agreement, and because no party objected to Kari T.'s motion at the hearing on the ground that Kari T. failed to file a written motion.

The DHHR agrees with the Petitioner that the granting of a post-adjudicatory improvement period is governed by West Virginia Code § 49-6-12(b) and requires the respondent in an abuse and neglect proceeding to file a written motion requesting the improvement period.

The DHHR avers that to its knowledge, no objection to Kari T.'s motion for a post-adjudicatory improvement period was made on the record on the ground that Kari T. failed to file a written motion requesting the same. The DHHR did not object on this ground as it anticipated Kari T. moving for such improvement period since it entered into a stipulated adjudication agreement with Kari T. with the understanding that Kari T.

² See Exhibit 1, "Order With Respect to Motion for Post-Adjudicatory Improvement Period", emphasis added. The DHHR and CASA moved the Circuit Court to allow this unsupervised visitation to be initiated on a gradual basis during the course of Kari T.'s improvement period, and beginning initially only with the oldest child. The youngest child, Blaine T., was to begin unsupervised visits with Kari T. only after Kari T. had completed several weeks of her improvement period and only if she were progressing in her treatment plan.

would move for a period of improvement. Furthermore, as part of said stipulated adjudication agreement, the DHHR agreed not to oppose Kari T.'s motion for an improvement period.

Furthermore, the multidisciplinary team had convened approximately one month prior to the hearing wherein Kari T. moved the Court to place her on a period of improvement, and the members of the multidisciplinary team developed the terms and conditions of Kari T.'s period of improvement should the Circuit Court grant her motion.

2. The DHHR did not object to Kari T.'s motion for a period of improvement even though results of a psychological evaluation performed on Kari T. were not yet available to the multidisciplinary team since the DHHR had agreed to not oppose Kari T.'s motion for a post-adjudicatory improvement period as set forth in the stipulated adjudication agreement, and because the multidisciplinary team had convened prior to the hearing to determine the family case plan and the terms of Kari T.'s improvement period were to include Kari T. undergoing a psychological evaluation and following the recommended course of treatment from said evaluation.

The multidisciplinary team (MDT) convened in this matter following the adjudication of Kari T. and approximately one month prior to the hearing wherein Kari T. was granted a post-adjudicatory period of improvement. The MDT convened to determine the family case plan and to develop the terms and conditions of Kari T.'s post-adjudicatory period of improvement should the Court place her on such. If Kari T. were granted a period of improvement, the MDT developed a case plan consisting of four elements which Kari T. would have to comply with. Element Three of said case plan consisted of Kari T. undergoing a comprehensive psychological evaluation to determine if Kari T. had any undiagnosed mental health issues or conditions. Element Four of the case plan consisted of Kari T. complying with the recommendations of the psychological evaluation and participating in treatment services if necessary. It was also discussed at

the MDT that the DHHR would provide the psychologist that was performing the evaluation on Kari T. with all relevant documents and medical records as it pertained to all of the children subject to the abuse and neglect proceeding so that the psychologist could have a thorough understanding of the issues involved, including the concern of Kari T. possibly suffering from Munchausen Syndrome by Proxy.

Kari T. did undergo a psychological evaluation in October 2008, prior to the hearing wherein the Circuit Court placed her on a post-adjudicatory period of improvement. While the official results and report from this evaluation were not yet made available to the DHHR and all parties prior to the hearing on November 13th, the DHHR had spoken with the agency that conducted the evaluation and as a result, anticipated that the psychologist had not found any major concerns with regard to Kari T. from a psychological perspective. With this knowledge, along with the fact that the DHHR had agreed to not oppose Kari T.'s motion for a post-adjudicatory period of improvement by way of the stipulated adjudication agreement, the DHHR did not object to Kari T.'s oral motion for a post-adjudicatory period of improvement at the hearing held in this matter on November 13, 2008.

3. The DHHR did not object to Kari T.'s motion for a post-adjudicatory period of improvement because Kari T. stipulated to adjudication, the Court had made no finding that Kari T. had subjected any of the children named in the proceeding to aggravated circumstances, and the DHHR was therefore required to make reasonable efforts to preserve the family unit and facilitate reunification by offering services to both Kari T. and the children involved.

On August 20, 2008, the Circuit Court adjudicated the children named in the abuse and neglect proceeding as neglected children at the hands of Kari T. Specifically, the Circuit Court found that Kari T. failed to provide the child, Blaine T., "with necessary food and nourishment, thus threatening the physical health of the child." (See

“Adjudication Order,” attached to Petitioner’s Petition for Writ of Prohibition as Exhibit

5.) This is consistent with the definition of “neglected child” as set forth in W.Va. Code § 49-1-3(h)(1)(A) which defines a neglected child as one:

[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child’s parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian....

It has long been established that the primary goal in cases involving abuse and neglect must be the health and welfare of the children. Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). In addition, the DHHR is also required in abuse and neglect cases to preserve and reunify families when at all possible. In accordance with federal law, “reasonable efforts shall be made to preserve and reunify families (i) prior to placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home”. 42 U.S.C.A. § 671(a)(15)(B). However, the DHHR is not required to make reasonable efforts to preserve the family if the court determines:

- (A) The parent has subjected the child to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse;
- (B) The parent has:
 - (i) Committed murder of another child of the parent;
 - (ii) Committed voluntary manslaughter of another child of the parent;
 - (iii) Attempted or conspired to commit such a murder or voluntary manslaughter or been an accessory before or after the fact to either such crime; or
 - (iv) Committed a felonious assault that results in serious bodily injury to the child or to another child of the parent; or
- (C) The parental rights of the parent to a sibling have been terminated involuntarily.

W. Va. Code 49-6-5(a)(7). See also 42 U.S.C.A. § 671(a)(15)(D).

In the case sub judice, the Circuit Court did not determine that any such circumstances existed that would relieve the DHHR of its burden to make reasonable efforts to preserve the family and develop a family case plan geared towards reunification of the family unit. Therefore, prior to the hearing on November 13, 2008, wherein the Circuit Court placed Kari T. on a post-adjudicatory period of improvement, the DHHR had been offering services to Kari T. and Kari T. had been successfully participating in said services.

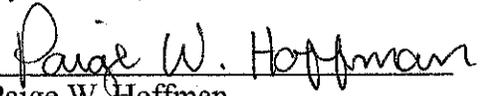
Therefore, pursuant to Kari T. stipulating to adjudication of this matter, availing herself of services, and absent a court finding that the DHHR did not have to provide reasonable efforts to reunify the family, the DHHR had a duty to provide such reasonable efforts and therefore agreed to not oppose Kari T.'s motion for a post-adjudicatory period of improvement.

CONCLUSION

For all of the above-stated reasons, the DHHR did not oppose Kari T.'s motion for a post-adjudicatory period of improvement. Furthermore, pursuant to state and federal law, the DHHR has a duty to provide reasonable efforts to preserve the family unit and promote reunification if at all possible, absent a finding by the Circuit Court of the existence of aggravated circumstances or some other condition as outlined in W. Va. Code § 49-6-5(a)(7), for which there was no such finding in this case.

RESPECTFULLY SUBMITTED,

State of West Virginia,
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